No. 22492

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.
Introduction.

In this case we made below, and make now, these essential points:

1. Absolute liability is an extreme rule, should be applied only in rare and manifest cases and cannot be imposed by administrative action in the circumstances here present.

2. That the contract (the use permit) in question must be interpreted to save its Constitutionality, if possible, and does not, as a matter of law, and *especially, upon motion for summary judgment,* impose absolute liability upon defendant.

3. The contract *by its terms* does not impose *absolute liability.*

4. Any interpretation of the contract which imposed absolute liability on the defendant while leaving its publicly-owned or consumer-owned counterparts re-

sponsible only for negligence is a denial of due process of law and the contained guarantee of equal protection of the laws established in the Fifth Amendment.

Ordinarily, one would suppose that an appellant's reply brief would be devoted only to rebuttal, and to reply to any new matter properly introduced into that brief. In our case, however, such cannot be the case. The United States, through the Attorney General and the United States Attorney has: (1) completely failed to meet the issues of law presented in the opening brief, and (2) introduced no new material whatsoever. With all due respect, we submit that the Government's brief is a parade of outmoded precedents, of cases which are not precedents at all, and a repetition of statements which are taken as true only because the Government says that they are true. Worse, the brief seems to ignore or quietly concede our points. Is this in hope the Court will overlook what we think are compelling precedents and convincing arguments?

This is not a negligence case. This is solely a claim that Edison is absolutely liable under a contract condition. The Government expressly stipulated that the Edison Company (defendant and appellant) was not negligent, thereby avoiding the trial of the issue, of contributory negligence and assumption of risk.

There is attached to this brief as Appendix A, a list of all of the authorities cited in the Government's brief in chronological order. In some cases, the citation of authority was extremely general and we do not know the primary source with any degree of exactitude. For example, on page 16 of appellee's brief, it is stated, "Since the times of Aethelbert and Alfred the Great, the doctrine of torts was that of absolute liability."

This statement is rested on no primary authority and on no text or precedent at all as far as one can read in the government's brief. In English history

there were at least two Aethelberts. One was King of Kent and ruled from 560 for about forty years. The other Aethelbert, a brother of Alfred the Great, was King, first of Kent, then also of Wessex. He ruled from about 858 to 865. Which King is the one meant is unknown to us.

1 Encyclopaedia Britannica (1964 Ed.) 230.

Alfred the Great was King of the West Saxons before the unification of Great Britain. He lived until about 900.

1 Encyclopaedia Britannica (1964 ed.) 595.

Sir Frederick Pollock and Frederick William Maitland, in their classic *History of English Law* (2d Ed. 1909), entitle the chapter dealing with Ethelbert I and Alfred the Great, "The Dark Age in Legal History." It is difficult to say more concerning the value of these authorities.

Surely when the Government says that "Negligence was unknown to the law until some thousand years later," (Government's Brief, p. 16) that is to say until 1900, there is a serious mistake. See Appendix B.

We do not, of course, contend that the ancient authorities are worthless. In fact, the ancient authorities, properly cited and understood, support the very rule of law which we contend requires reversal of the summary judgment. Equality of treatment of all persons by the government, both in its capacity as land proprietor and governor, is the essential which is derived from the entire background of our legal system, reinforced, as it has been, by the written Constitution of the United States. The concept argued in the brief of the Government that it can treat persons cavalierly when it is dealing with its own property is as false as the doctrine that an individual who owns property may use it as he

chooses without regard to fairness and equality. We doubt if it was ever the law that a man could use his property exactly as he chose without any reference to the welfare of or effect upon fellow human beings, but whatever the law may have been, it has at least been true since the time of Hammurabi's Code and Magna Carta, and the Constitution of the United States including the Fifth Amendment that our Government cannot act even with the liberties of a feudal noble. Not even the King of England, in the days of the most Divine Right, had the authority to deal unequally with his subjects.

The brief of the United States not only takes the position, contrary to law, that absolute liability is the rule and the responsibility to act prudently, or with reasonable care, the exception, but also seems to take the position that the Government has no limits whatever upon its use of public land. It seems hard to believe that these words come from the office of an Attorney General who so zealously has advocated equality in almost every other sphere of human activity.

II.
Absolute Liability.

In our opening brief (pp. 11-13) we thought we had cited text and decision which established, beyond question, that absolute liability was the exception and the duty of acting with reasonable care the rule. In the brief for the United States no direct answer is made to this argument but the position seems clearly to be taken that absolute liability is the real frontlet of our jurisprudence and, really, negligence is sort of an afterthought that uselessly crept into the law and really should play no part in our case. (See Brief for the United States, pp. 16-17). If absolute liability were always applicable as the government says it is, at least in forest fire matters, why for at least fifty years

has the government burdened itself with proving negligence. See Reporter's Transcript, pages 19-20.

The Government admitted in the argument of this case that the absolute liability clause was present for many years in similar contracts and had been in use since 1916; yet never before has the Government attempted to impose absolute liability. On the contrary, they always relied upon negligence, and so, in several cases, as to this very defendant [R. Tr. p. 9, undenied statement by the attorney for defendant], and [R. Tr. pp. 19-20 statement by the Government attorney]. In fact, the Trial Court was itself amazed:

> "The Court: This is the first non-negligent electrically caused fire that has arisen under such contract even though it is over fifty years old?
>
> Mr. Coleman: So far as I know. I don't know of any other such cases.
>
> I will say this, that probably in the great majority of the cases negligence can be found. I would say that perhaps the fire which occurred in this case wasn't particularly a clearly negligently caused fire. Of course, that is now out of the case since a stipulation has been entered into by the parties."

We put it as the truth: In fifty years the Government has never attempted to impose absolute liability and has contented itself with collecting where it could prove negligence, and foregoing exactions where it could not.

Absolute liability is extremely rare in our law. It does not penalize fault; it penalizes coincidence and misfortune. It is not, and it should not, be the rule here. The Government's position (which, in substance, is that forest fires are ordinarily caused by vagrant electricity, that the transmission and distribution of electricity is a "high hazard" use of the forests), is illogical, rested upon no authority, immoral, and denied by the Government itself when it is convenient so to do.

Without desiring to repeat, it is to be noted that electricity is deemed a minor cause of forest fires—so small it cannot be statistically calculated (see Cl. Tr., Affidavit of Richard T. Drukker, page 121). The National Geographic Magazine, [Volume 134, Number 1, July 1968, p. 127], quotes Malcolm Hardy, Director of the Cooperative Forest Fire Prevention Program of the United States Forest Service (the symbol of which is Smokey the Bear) to say, "For the nation as a whole, however, nine out of ten forest fires result from somebody's carelessness, ignorance, bad luck or malicious disregard for the rights of others. A disturbingly large number—more than one in four are set intentionally. . . . Not far below incendiarism in the statistics is debris burning."

National Geographic Magazine, *ubi. cit.*, 127.

It is clear that the Forest Service believes and asserts that electricity which non-negligently causes a fire is surely a minute factor in the forest fire problem. As a matter of fact, on August 4, 1968, on Channel 7, Los Angeles, in the early evening, the Forest Service sponsored a commercial in which the speaker said, "Nine out of ten forest fires are caused by your carelessness. Be careful with fire in the national forest."

We submit that it is a false quantity to contend that electricity as such is a high hazard to the forests. It is manifestly not, on the basis of the Forest Service's own assertions. The distribution and transmission of electricity is not a high hazard to the forests and no matter how many times the Forest Service says it is, it is not. Further, the Forest Service cannot call to its aid the doctrine of consistent administrative interpretation because they themselves use the fact that carelessness is the essential cause of fires. The statement that twenty-five percent result from incendiarism can be reconciled. Out of 100%, 25% are caused by in-

cendiarism and of the remaining 75%, 90% are caused by negligence. At most this leaves seven and one-half percent for all other causes including a minute portion for non-negligent electric transmission. Is this a "high hazard?" We were not negligent in fact and by stipulation and according to the statement of the very attorney for the Government in the very transcript here. We should not be required to pay without the right to present our case, which, incidentally includes a strong case on contributory negligence, assumption of risk, and implied consent.

III.

The Contract.

We have already argued this point at length in our opening brief, pages 13-18. We will not repeat the arguments here. They seem not to have been answered at all, except perhaps by saying that Edison did not have to enter into the contract. We submit that, in principle, that this is like saying that a Negro child does not have to attend school at all if he does not want to attend a segregated school. The Southern California Edison Company, as is judicially known, is an electric utility which must serve the consumers in its prescribed area who desire to buy electricity from it. It functions under Certificates of Public Convenience and Necessity. The Federal ownership of lands in the Western States is such that one cannot, except by magic, convey electricity from the sources thereof in the High Sierra, at Boulder Dam, or at Four Corners, to the millions who need the electricity in Southern California without crossing public land and, practically, without crossing Forest Service lands.

In connection with this phase of the brief we think two subordinate points ought to be mentioned:

1. The "words" of the contract are not of themselves controlling. The intent of the contract is. "Mystic incantations familiar to the ancient Egyptians

and Totemistic names in medieval Turkish" do not now matter.

Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., (July 11, 1968) 69 A.C. 28, a nearly unanimous decision of the California Supreme Court written by Chief Justice Traynor.

2. The meaning of this contract can only be understood in light of the actions of the parties. Without repeating our arguments on why this contract did not impose liability in words (properly interpreted) it is sufficient to point out that:

A. By granting the motion for summary judgment, we were completely denied access to proof of the true meaning of the parties; and

B. It seems inconceivable that absolute liability would be imposed on the users of the national forest, absent coercion, whose use produces less than one percent of the forest fires.

The Government says orally and in writing, by widespread television commercial and by extended documents, that non-negligent fires are of no moment and yet, now, for the first time in fifty years, seeks to continue on the one hand its campaign against negligence and on the other say that negligence really does not matter; that those users of the forest, who are prosperous enough and are investor-owned must pay for every fire even though, admittedly, the fire occurred without its fault at all. The parties intended no such meaning.

Since this case was concluded in the District Court some time ago, there has come to our attention Emergency Directive No. 5 issued by the Forest Service as of June 30, 1968. The document bears number 2710, is 79 pages long and was signed by M. M. Nelson, who is apparently Deputy Chief of the Forest Service.

This booklet contains a new method of calculating the rents paid by users of the forest (not including electrical transmission or distribution lines, however). The users covered are ten businesses; namely, grocery stores, snack bars and carryout food facilities, automobile repair and servicing organizations, general merchandise stores which sell such things as fish bait, hunting equipment, souvenirs and gifts, liquor stores, including bars and cocktail lounges, outfitter guides, when associated with resorts or dude ranches, lodging providers, where there is room service, cabin renters, and a miscellaneous group including trailer courts, trailer renters, horse renters, barber shops, boat gasoline and oil sellers, dockers and moorers, and last, but not least, pool hall operators. (Forest Service Manual [Emergency Directive No. 5] June 30, 1968, pp. 2710-6 and 2710-7). By this manual all of these parties are assured an income.

The Government's fees turn on whether they make a profit or not. If an unusual development occurs, such as a forest fire, a reduction in the fees paid to the Government is permitted. In other words, this booklet at least provides that the operator breaks even. If not, his rental is lowered. The inevitable effect of forest fires is conceded and the loss therefrom is allowed to reduce the Government's rent. (Emergency Directive No. 5 of June 30, 1968, pp. 2710-3 and 2710-17). We cannot, because of cost, duplicate this entire 79 page manual as an appendix to this brief, but we will, upon request of our opponent, who issued the directive, or upon request of the Court, lodge with the Court the only copy that we have. Perhaps upon the Court's request, the Government will furnish the Court with an appropriate number of full copies. We attach as Appendix C a copy of the title pages and pages cited herein.

It would seem that the Southern California Edison Company, a certificated seller, transmitter and distributer of electricity under Certificates of Convenience and

Necessity, ought to be at least treated as well in its use of the national forest as the operator of a cocktail lounge, liquor store or a pool hall.

Is it equal protection to demand damages from one citizen for a fire over which he has no control but lower the rents of another when he suffers from the same *force majeure?*

IV.
Constitutionality.

Our argument in the opening brief in this matter, from pages 18-33, was based on several propositions, none of which seem to be answered in the Brief of the United States and, in fact, seem to be conceded, or go unnoticed, in large part.

1. The point that absolute liability was not imposed upon publicly-owned utilities, although it was on investor-owned, and that this was unconstitutional. We argued that the Government itself recognized the illegality of such an interpretation of the statutory powers of the Forest Service when they themselves stated to their employees that it was beyond the authority of state, county or municipal officials to bind themselves to unlimited liability (Opening Brief, p. 19). Yet, it is manifest that if the Government had the constitutional right so to interpret the law, the public officials would have to obey it by reason of the Supreme Law of the Land clause. We cannot find that this argument was even mentioned in plaintiff's brief. If we have overlooked it, the mention is so subtle as wholly to escape us. At least in the index to the Brief of the United States, Article Six of the Constitution is never mentioned.

2. The point that equal protection is a part of due process, as has most recently been proclaimed in the segregation cases (*Bolling v. Sharpe,* 347 U.S. 497; and *Brown v. Board of Education,* 347 U.S. 483).

The only rebuttal to this doctrine seems to be, in the Government's mind, that the Fifth Amendment has no equal protection in words. We do not argue that there may not be a reasonable ground for classification. What we do argue is that we have never had a chance to moot this issue. The Court said:

> "Let me say about the Constitutional argument that it is in my opinion not substantial and not valid. This is not a Constitutional argument of merit and defendant has cited no authority and therefore the offered evidence in the affidavits would be irrelevant and immaterial." [R. Tr. p. 23].

Thus, the Court having ruled that our Constitutional argument, *a priori,* was insubstantial, invalid, irrelevant and immaterial, it was unnecessary to look to the facts at all. We do not construe the power of the Court to grant summary judgment to be this wide. In light of the historical analysis hereinafter contained one cannot seriously argue that the equality [not identity] required by the principle of equal protection is not a limitation upon the Federal Government under the due process clause.

3. The point that the Government does not have absolute power over its land.

It does not seem conceivable that in 1968 the Attorney General of the United States would argue that the power of the Government over federal land is unfettered, absolute and plenary. Yet, conceivable or no, this is exactly what the Government has done.

(a) "The United States is not required, if it bestows a bounty or permits the use of its property, to refrain from imposing any conditions or limitations." (Government's Brief, pp. 5 and 6). "The power to grant or withhold privileges comprehends the power to impose *reasonable* conditions." (p. 6). This sentence must

have been inserted by error, for it does recognize that the granting of privileges is limited by the imposition of *reasonable* conditions (Emphasis added). This is, in fact, the law. The difficulty here is we have not been permitted to offer proof that the conditions are unreasonable.

(b) "Having agreed to assume absolute liability for electrically caused fires, and having accepted the benefits of the right of way permit, Edison is now estopped from resisting enforcement of this agreement by asserting that the agreement is invalid on the basis of alleged unconstitutionality." (p. 6). We have never heard of estoppel to assert a constitutional right. Gideon tried his case without counsel (*Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. ed 2d 799). Was he estopped to assert his constitutional right to freedom? Many prisoners seek parole after an unconstitutional conviction. After denial are they estopped on *habeas corpus?* This is a mere restatement of the doctrine of unconstitutional conditions. In the Government's brief, Part II, pages 17-19, it is argued that defendant, having bargained for the right to use the national forest, is now estopped to claim that any of the conditions of its contract are unconstitutional. It would hardly seem that at this late date the Attorney General would argue in favor of the doctrine of unconstitutional conditions.

If there is an established principle of American Constitutional Law, it is that neither the executive nor the Congress, nor any administrative authority created thereby can impose what would otherwise be an unconstitutional condition by exacting from a promisor an agreement so to act. The doctrine has been used to avoid all kinds of contracts; for example, contracts with public utilities whereby they bind themselves in advance to an unconstitutional condition to obtain favorable ac-

tion in obtaining a certificate of convenience which would otherwise not be granted by a utility or railroad commission. The early cases on the subject seem principally to be:

People, etc. v. Public Service Commission of New York, 264 N.Y. 17; 189 N.E. 764, where the Court, speaking through Judge Lehman, voiced a contract saying,

> "It cannot make its (the Public Service Commission's) consent dependent upon conditions which are unreasonable or which do not change the terms of the transfer of the franchise, works, or systems, or which encroach upon the right of the relator to administer its corporate affairs according to its own judgment in matters in which the Legislature has not given the Public Service Commission any regulatory or supervisory powers."

Lockport Light, Heat & Power Co. v. Maltby, 257 App. Div. 11; 12 N.Y.S. 595, where the Court said:

> "The power of the Commission was not increased through the acceptance of the conditional order by the vice presidents of petitioners. Property and constitutional rights could not be destroyed, abrogated or waived by the corporations' officers."

The United States Supreme Court passed on the matter in *Frost v. Railroad Comm. of California,* 271 U.S. 583. There the Court held that the state could not bring about a result by imposing an unconstitutional requirement as a condition precedent to the enjoyment of a privilege which [it was assumed] to be within the power of the state altogether to withhold if it sees fit to do so.

> "[In imposing such an unconstitutional condition in a contract] *in reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which*

may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden." (Emphasis added.)

Approving *Frost* are, among others,

Williams v. Standard Oil Co., 278 U.S. 235;
U.S. v. Chicago etc. Ry., 282 U.S. 311;
Garrity v. New Jersey, 385 U.S. 493;
Harmon v. Forssennius, 380 U.S. 528 (per Warren, C. J.).

See also

73 *Harv. L. Rev.* 1595, 99-00.

Of course, the recent classic in this area is *Shelley v. Kraemer,* 334 U.S. 1. In that case thirty owners of real property in St. Louis signed a contract providing that for fifty years from the date of the contract no part of their land should be occupied by a person not of the Caucasian race, "it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

This contract had, in substance, been upheld by earlier cases and the *Civil Rights Cases,* 109 U.S. 3, had held that the Fourteenth Amendment erected no shield against wrongful or discriminatory private contract. In Mr. Chief Justice Vinson's opinion, the Court held this contract void and held that any condition or covenant of the discriminatory effect intended or effected by the quoted words was violative of the Constitution and a denial of due process of law and the privileges and immunities of citizens of the United States. It is interesting to note that *Yick Wo v. Hopkins,* 118 U.S. 356, which we have cited elsewhere, was one of the support-

ing opinions in the *Shelley* decision. We submit that not a whit of validity is added to the Government's case by the fact that we, under coercion, agreed to pay for a fire for which we were not liable (if we did). The basic concept is that it is contrary to manifest fairness to make one electric public utility pay for a non-negligent fire and let another off without a *scintilla* of penalty therefor.

(c) "The unfettered power of Congress to dispose of the public lands is beyond the reach of the other branches of the Government." (p. 9). We had supposed that we had a checks and balance system and that no branch of the Government was supreme over the others. The citations do not support the position. All they support is that things which reasonably should not be done are properly prohibited to users of the forest. The list beginning at page 9 and extending through page 10 almost without exception says this and nothing more. The recent cases cited in our opening brief, which apparently are agreed to by the Government because they have cited the same cases, establish beyond doubt that the Government's rulings in this matter must be based upon reasonable grounds and therefore must stand the test of Constitutional due process. See particularly *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275. We do not gainsay Mr. Justice Holmes that forest fires are one of the great economic misfortunes of the country and that California, having forests and, frequently, hot weather and low humidity, is an especially bad place for forest fires, but to blame a party, stipulated to have been without fault, for a forest fire is shocking. We do not deal, incidentally, here with any of the traditional areas of absolute liability, such as wild

animals or explosives. Even a presumption of negligence as applies to carriers is a rebuttable presumption. In the Warsaw Convention a party before being held to absolute liability has a day in court to show that he was not at fault. Here it is agreed that we were *not* at fault, yet the day in court is not ours.

(d) We devoted about six pages of our brief (pp. 27-32, inclusive), to the doctrines of what we called the *Perko* cases; namely, *United States v. Perko,* 133 Fed. Supp. 564; *United States v. Perko,* 108 Fed. Supp. 315; *Perko v. U.S.,* 204 F. 2d 446, cert. denied, 346 U.S. 832; *Perko v. Northwest Paper Co.,* 133 Fed. Supp. 560; *United States v. Perko,* 141 Fed. Supp. 372; and *Bydlon v. U.S.,* 175 Fed. Supp. 891. These cases, which were collectively one of the cornerstones of our argument, appear to have been completely ignored by the United States except in a footnote on page 22 of the Government's brief. It may have been good strategy to ignore the *Perko* cases, and inaccurately to state of them that they are "intimations culled from *dicta*" but we submit this sort of briefing does not aid the Court at all. In the footnote the Government states that the doctrine of these cases is "unexceptional." That is all that is said except for a suggestion that we should not have agreed to use the national forest if we did not like to use it on the terms of the Government's proposal.

(e) The quotation from the 147 year old decision, *McClung v. Silliman,* 6 Wheat. 598 (1821) is at least owed respect because of its age, but to make the statement, "The Government's power of disposal is absolute," and to try and support it by the Constitutional quotation from Article 4, Section 3, or the *Silliman* case in these days is without reason. Surely no one seriously contends today that the right to dispose of real property is unfettered, no matter who the "owner" is!

To say that Congress may take such steps as it deems necessary to protect the public land, by preventing unauthorized mining, fencing or use by unauthorized persons for illegal means; to say that it may punish adjoining land owners for leaving fires on private lands which may imperil the public forests; to say that the Government may limit the amount of acreage which a single land owner can obtain are commonplaces not relevant to the present problem. Although we were criticized for putting hypothetical cases by the District Court, we take one more risk here: Does the Government argue that it could issue a contract for use of the public land for transmission of electricity to a corporation which has no Negro shareholders on more favorable terms than it could grant the same right to an organization of which ten percent of the equity is owned by Negroes, or twenty percent or one hundred percent? It is, we submit, as unseemly as it is erroneous to argue with the one hand against discrimination when minorities are involved, but for it when big, investor-owned public utilities cross the television screen.

We do not contend that the statutes are unconstitutional. We contend, as did *Yick Wo,* (118 U.S. 356, 6 S. Ct. 1064, 30 L. ed. 220) that the application and interpretation of the statutes in exacting the contract here in force is unconstitutional.

V.

Due Process of Law.

We devote this section of our brief to the basic establishment of the fact that first, due process requires equality; second, that the due process clause applies to the Federal Government, and historically and primarily equality of treatment of persons in equal place has always been the cornerstone of our jurisprudence. We beg the Court's indulgence briefly to trace the historical

development of due process of law and the reasons why in this case the Government cannot, even if the contract in words were to so prescribe, treat the Southern California Edison Company differently than it treats its sister transmitters and distributers of electricity, the owners of which are not stockholders, but are ratepayers or municipal corporations.

As far back as the days of Hammurabi equal rank required equal treatment. In this primeval period of the development of civilized law men of disequal rank could be treated disequally, but the basic concept of equality of treatment by the government was never more clearly put. Article 200 of the Code of Hammurabi may be compared with Articles 201 and 202, and a similar comparison can be noted in other articles. In Appendix D of this brief there is set forth a copy of Articles 200 to 205, inclusive, of the Code of Hammurabi (B.C. 2285-2242) and the barest study will show this ancient law to have been founded upon the very principle of equality for which we contend in 1968.

> Davies, *The Codes of Hammurabi and Moses* (1905) 86-87.

There may have been earlier written laws, but Hammurabi's Code is generally believed to be the oldest code of laws thus far discovered by archaeologists or scholars.

> Johns, *The Oldest Code of Laws in the World. The Code of Laws Promulgated by Hammurabi, King of Babylon, B.C. 2285-2242* (1903) pp. 42-50.

See also

> Driver and Miles, *The Babylonian Laws* 56-7. (Reprint Edition 1956).

In terms of years, it is a long time from Hammurabi to King John, but in spirit, the distance be-

tween Hammurabi's Code and the Magna Carta is short indeed. In Magna Carta is found the famous Article 29, "The no free man" clause, identified by its first three Latin words, *nullus liber homo*. Article 29 reads:

> "No free man (*nullus liber homo*) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land (*per legem terrae*)."
>
> Pickering, *The Statutes at Large from Magna Carta to the End of the Eleventh Parliament of Great Britain* (1761-2);

and see

> *The Constitution of the United States of America, Annotated*, (1964) 959.

The words "due process of law" are in themselves not used in Magna Carta. It was Coke who rendered the words "the law of the land" (*per legem terrae*) into due process of law on the basis of intervening statutes. The meaning, however, of the words was the same in both of the authorities, as is consistently set out by all of the leading writers.

> McKechnie, *Magna Carta, A Commentary on the Great Charter of England with a Historical Introduction* (1914) 3-47.

See also

> *The Constitution of the United States of America Annotated*, at 959-960.

It was not long after Magna Carta when the guarantee was made even more firm. In 1354 Edward III re-affirmed the doctrine of due process of law using the words themselves.

development of due process of law and the reasons why in this case the Government cannot, even if the contract in words were to so prescribe, treat the Southern California Edison Company differently than it treats its sister transmitters and distributers of electricity, the owners of which are not stockholders, but are ratepayers or municipal corporations.

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The words "due process of law" are in themselves not used in Magna Carta. It was Coke who rendered the words "the law of the land" (*per legem terrae*) into due process of law on the basis of intervening statutes. The meaning, however, of the words was the same in both of the authorities, as is consistently set out by all of the leading writers.

McKechnie, *Magna Carta, A Commentary on the Great Charter of England with a Historical Introduction* (1914) 3-47.

See also

The Constitution of the United States of America Annotated, at 959-960.

It was not long after Magna Carta when the guarantee was made even more firm. In 1354 Edward III re-affirmed the doctrine of due process of law, using the words themselves.

"That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor be put to death, without being brought in answer by due process of the law."

Pickering, *The Statutes at Large from the Fifteenth Year of King Edward III to the Thirteenth Year of King Henry IV, Inclusive* (1762) 97.

Thus fortified by ancient statutes, the matter was considered almost over a whole lifetime by Sir Edward Coke. We suppose it is not necessary really to establish Coke's eminence, but the coincidence of one of his government offices and his general influence and eminence is so great that some mention should be made when the doctrine he so importantly championed is the basis of this brief. Catherine Drinker Bowen said:

"Sir Edward Coke never set foot on American soil. Yet no United States citizen can read his story without a sense of immediate recognition. In these parliamentary struggles, knights, citizens and burgesses fought not for themselves alone but for states as yet unformed: Pennsylvania, Virginia, California. In Westminster courtroom battles over procedure, jurisdiction, 'right reason and the common law,' constitutional government found its way to birth. When the time came we changed the face of this English constitution; amid the sound of guns we repudiated what we hated, adapted what we liked. Yet the heritage endured."

Bowen, *The Lion and the Throne,* The Life and Times of Sir Edward Coke (1956) Page X.

Coke continually relied upon the earlier precedent to establish the absolute requirement that the govern-

ment treat all of its citizens equally within, of course, the limitations of the common law. Of course he did not contend, nor do we contend, that every person must be treated identically, rather that they be treated equally.

Thus it is clear that the Government may require a citizen to pay a dollar to enter Yellowstone National Park for a weekend of camping and that it can prohibit another citizen who does not pay the dollar from entry. The two citizens are not treated identically, by they are treated equally. There is reasonable ground for admitting the one and refusing the other. In this case, however, we are confronted with a government which says to a privately owned electric utility company, "You cannot use the national forest for transmission or distribution lines unless you agree to be absolutely responsible for a fire even though it is not your fault," and at the same time says to another electric utility company using the forest in the same way, sometimes, in fact, on the same lines, but which utility is owned by its customers or by some local governmental authority, "You may use the national forest without assuming any liability except that of acting prudently; that is, without negligence. In fact, you could not agree to do anything more and that is one of the reasons we are allowing you to use the forest on these easy terms while requiring the harsh burdens of your competitor." We submit that the utter absurdity of such a rule can be no more clearly demonstrated than by a recent development which occurred, apparently since the judgment in this case.

We refer this Honorable Court to the Wall Street Journal for June 28, 1968. The article is reprinted in Appendix E to this brief and it is illustrated by the maps set out as Appendices F and G. It will be noted that a Rural Electrification Administration supported, consumer-owned public utility (one of the kind which only must assume the burden of reasonable care to use the national forest) purchased a one-half undivided in-

terest in a plant and its accessories at Steubenville, Ohio, which facilities were owned by a privately-owned public utility. This plant has lines which conduct the electricity manufactured there across the Wayne National Forest. We wonder now what the rule of liability is as to a fire caused by the electricity of this plant on the national forest land, without negligence. Is it deemed that the innocent REA electrons caused the fire so there is no liability, or is it the evil-hearted electrons of the private power company, or perhaps one can apply the admiralty rule and divide the damages and say there is absolute liability but one for half the damages, or perhaps some meter can be devised by the Forest Service which will, in a new fashion, bifurcate the electron and we will know which half, the private half or the public half, really caused the fire.

The District Court, of course, said in its opinion that since the Constitutional argument was irrelevant, it was unnecessary to look at the facts as to whether it was true. The argument lacking validity, as the Court said, the truth was irrelevant and immaterial [R. Tr. pp. 23-4].

The simple fact is that the transmission or distribution of electricity rarely causes a forest fire. Probably something less than one percent of all forest fires are so caused, and of that miniscule portion, only a still smaller portion are caused by the negligence of the line operator. To try to develop from this fact a doctrine that the ordinary rule of negligence should not apply but that a coerced contract should be relied on to establish a doctrine of absolute liability seems to us wholly inconsistent with the enlightened thoughts of an enlightened age.

To return to the historical development, the doctrine that the more important the man the greater should be the punishment [which, in substance, is what

the Government contends for in our case] was the doctrine of the Star Chamber and the doctrine which Coke so greatly resented and so completely rejected.

Bowen, *op. cit.* 108-109.

He consistently argued, maintained and drove English justice to accept the concept that equality was the rule of law and that the government must treat equals equally. Relying on Chapter 39 of Magna Carta, the statute of Edward, and his own Petition of Right, Coke evolved the doctrine that this concept was not a matter of grace or privilege but a requirement upon the king. No doctrine is more firmly embedded in American Law.

Bowen, *op. cit.* 490, 494-504, inclusive.

By the time of the establishment of our government the founding fathers, and especially the lawyers among them, well understood the doctrines upon which comment has just been made. Mr. Justice Story, Colonel John Rutledge of South Carolina, Chief Justice John Jay, John Quincy Adams, Thomas Jefferson, almost every name which we now revere, can be found in the list of those who said that Coke's principles were the principles upon which the American government and the meaning of our Constitution were founded.

Bowen, *op. cit.* 513-515.

And the doctrines were especially commended to the legal profession. Thomas Jefferson said:

> "Coke Lyttleton was the universal elementary book of law students and a sounder Whig never wrote nor profounder learning in the orthodox doctrines of British liberties. . . . But when his black letter text and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the student's book, from that moment that profession (the nursery of our Congress) began to slide into Toryism."

See 1 Warren, *History of the Harvard Law School* (1908) 139.

Coke was clear that Magna Carta meant that penalties should not be inflicted nor property taken without due process of law. They could not merely be taken because the law said so.

Bowen, *op. cit.* 517.

Lord Coke died in 1634. He died before the founding of Harvard University and yet his words are as alive today as they were on the day of their utterance, and it seems to us oddly appropriate that in this case of forests and public lands we are able to rely upon a man who was not only Solicitor General to Queen Elizabeth, Speaker of her Parliament and Her Attorney General, Attorney General to King James, Privie Counsellor to Queen Anne, Chief Justice of all the Benches of England, and, above all else, the most Honorable Caretaker of Her Majesty's Forests, Chases and Parks.

Bowen, *op. cit.* 535-536, quoting the inscription upon Coke's tombstone.

Following the historic principles, our courts have continued to announce the doctrine for which we contend, and that is that due process of law prevents the Forest Service from acting as it has in the instant case and prevents the court from granting a summary judgment before we have the right to show by proof and by facts judicially noticed that there is here no reasonable ground for distinction between the private power company and the public one, that both should be responsible for their carelessness and neither for accidents which occur without fault.

The concept of equality as an essential of due process and of constitutionally permissible government continued as part of the fundamental law of the United States in the period following the adoption of the

Constitution in 1789. In 1856 *Murray's Lessee v. Hoboken Land & Improvement Co.* was decided (18 How. 272. The Supreme Court decided that the due process clause of the Fifth Amendment was a restraint on Congress as well as on the executive and judicial powers of the national government and that Congress is not free to make any process it chooses "due process" nor are the executive or judicial branches of the government. In the *Sinking Fund Cases,* 99 U.S. 700, it was held that the due process clause applied to all persons within the United States, including corporations. The Fifth Amendment, as the Fourteenth, is tolerant of legislative classifications but condemns those that are arbitrary and unreasonably discriminatory.

Steward Machine Co. v. Davis, 301 U.S. 548;
Detroit Bank v. U.S., 317 U.S. 329.

Systematically, the Supreme Court has condemned federal action that is unreasonably discriminatory and the results arrived at have been just as faithful to the concept of equality as the cases which involve an interpretation of discriminatory action by the states under the Fourteenth Amendment. The cases are well collected in the Annotated Constitution of the United States.

See *United States Constitution Annotated, supra,* pages 973-975.

Perhaps the most recent language is that of *Bolling v. Sharpe,* 347 U.S. 497, which we cited in our opening brief, where the court said, "It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Here the court held that the Federal Government could not discriminate so as to segregate Negro school children in the District of Columbia. We submit that no more need be said on this issue and that any argument or effort by the Government to contend that unreasonable discrimination in the use of federal land is not for-

bidden to the Federal Government and to its administrative and executive officers is bound to fail.

The recent text writers have been equally clear. We do not wish to extend this brief unnecessarily and so will refrain from citing in detail from the following authorities, each of which we think establishes beyond question that the requirement of equality and freedom from unreasonable discrimination on the part of citizen and government alike is a Constitutional *sine qua non.*

Warsoff, *Equality and the Law,* 13-21, 42-47, 158-167; 224-225, 282-283, 306-307;
Mott, *Due Process of Law,* 36-37;
Thorne, *Sir Edward Coke,* 10-12;
Bodenheimer, *Due Process of Law and Justice,* in *Essays in Jurisprudence in Honor of Roscoe Pound,* 463-484.

In commenting upon our Constitution and the antecedent historical documents, Professor Warsoff says:

> "When the authors of the Declaration of Independence included in that document the 'self-evident' principle that all men are created equal, they were but affirming the belief upon which both the Revolution and the Republic were founded. (Warsoff, *op cit.,* 19) Never was a government more earnest in its desire to secure to all its people the equal protection of laws." (*Ibid.*)

Samuel E. Thorne, Professor of Legal History at Harvard and some time Professor of Legal History at Yale, said in 1957 in one of the most learned recent lectures on Coke that in promulgating the petition of right, Coke intended the due process clause to apply *principally* as a limitation on the national government (Emphasis added). This hardly seems consistent with the Government's stress on what it claims are the unrestricted, virtually divine powers of the National Government when dealing with the national forests.

Thorne, *op. cit.*, 9-13, inclusive.

Bodenheimer and Mott both emphasize at length the applicability of the due process clause to the Federal Government and the fact that the equal protection clause was always thought of as part of due process long before the modern cases proclaimed that to be the fact, as cited in our opening brief.

Perhaps the most recent words, are those where Mr. Justice Fortas teaches us:

> "The Constitution of the United States is a law for *rulers* and people . . . and covers with the shield of its protection all classes of men at all times and under all circumstances."
>
> Fortas, *Concerning Dissent and Civil Disobedience* (May 1968) 20.

It cannot then be doubted that we had the right to present our case and to prove, if we can, that which we showed by offer of proof and affidavit and that which is additionally available that there was no sense whatever in requiring us to assume an obligation absolute in nature while at the same time only the ordinary duty of due care was required of our publicly-owned competitors and to prove we are treated unequally in a Constitutional sense in our use of the National Forests.

VI.
Conclusion.

In a nutshell, we submit the time has come when Constitutional rights are afforded to everyone. We do not say for a moment that the downtrodden, the poor, the non-white, the innocent man unconstitutionally accused or convicted is not entitled to all of the advantages of the Bill of Rights. But, the Bill of Rights is not protection for the poor alone. It is protection for the

rich, it is protection for the lucky, it is protection for the large corporation, it is protection for he who is viciously competed against. It is and must ever be the last best Constitutional resort of all.

We were not afforded a trial here. We have been adjudged to pay for a forest fire, a tragedy visited upon all our people, without our fault. We have been selected to bear this loss simply because we were there. Being convenient, we were guilty. This ought not be and we zealously contend it is not the product of American Constitutional law.

Respectfully submitted,

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APPENDIX A.

Chronological List of Authorities in Appellee's Brief.

Serial No.	Brief Page	Authority[4]	Date of Decision or Authority
1.	16	Ethelbert, King of Kent	*c.*598 [A.D.]
2.	16	Alfred the Great	*c.*877 [A.D.]
3.	7	*McClung v. Silliman,* 6 Wheat. 598	1821
3A.	8	*U.S. v. Gratiot,* 14 Pet 526	1840
4.	9	*U.S. v. Gear,* 3 How. 120	1845
5.	8	*Homestead Act of 1862*	1862
6.	8	*Gibson v. Chouteau,* 13 Wall. 92	1872
7.	19	*Daniels v. Tearney,* 102 U.S. 415	1880
8.	16	Wigmore, *Responsibility for Tortious Acts,* 7 Harvard Law Review 441	1894
9.	16	1 Pollock & Maitland, *History of English Law Before the Time of Edward I*	1895
10.	22	*St. Louis & San Francisco R'y v. Mathews,* 165 U.S. 1	1897
11.	17	*Jones v. Brim,* 165 U.S. 180	1897
12.	9	*Camfield v. U.S.,* 167 U.S. 518	1897
13.	2	*The Organic Administrative Act of June 4, 1897,* 30 Stat. 35; 16 U.S.C. 551	1897
14.	22	*Atchison, Topeka & Santa Fe R.R. v. Matthews,* 174 U.S. 96	1899
15.	13	*Boske v. Comingore,* 177 U.S. 459	1900
16.	2	*Act of February 15, 1901,* 31 Stat. 790, as amended; 16 U.S.C. Section 522	1901
17.	17	*Chicago, R.I. etc. Ry. Co. v. Zernecke,* 183 U.S. 582	1902
18.	9	*Van Lear v. Eisele,* 126 Fed. 823	1903
19.	8	*Butte City Water Co. v. Baker,* 196 U.S. 119	1905
20.	16	Ames, *Law and Morals, 22 Harvard Law Review 97*	1908
21.	9	*U.S. v. Grimaud,* 220 U.S. 506	1911
22.	3	*Act of March 4, 1911,* 36 Stat. 1253, as amended; 16 U.S.C. Section 523	1911
23.	21	*Ohio Tax Cases,* 232 U.S. 576	1914
24.	16	Smith, *Tort and Absolute Liability,* 30 Harvard Law Review 241, *et seq.*	1916

Serial No.	Page Brief	Authority[4]	Date of Decision or Authority
25.	17	*N.Y. Central Railroad Co. v. White,* 243 U.S. 188	1917
26.	8	*Utah Power & Light Co. v. U.S.,* 243 U.S. 389	1917
27.	19	*Wall v. Parrot Silver etc. Co.,* 244 U.S. 407	1917
28.	8	*Ruddy v. Rossi,* 248 U.S. 104	1918
29.	23	*Crescent Oil Co. v. Miss.,* 257 U.S. 129	1921
30.	10	*Southern Pacific Co. v. Olympian Co.,* 260 U.S. 205	1922
31.	21	*Heisler v. Thomas Colliery Co.,* 260 U.S. 245	1922
32.	16	2 Holdsworth, *History of English Law,* (3rd ed.) 51	1923
33.	19	*Booth Fisheries Co. v. Industrial Comm.,* 271 U.S. 208	1926
34.	11	*Fox River Co. v. R.R. Comm.,* 274 U.S. 651	1926
35.	22	*Hayman v. Galveston,* 273 U.S. 414	1927
36.	20	*Buck v. Bell,* 274 U.S. 200	1927
37.	10	*U.S. v. Alford,* 274 U.S. 264	1927
38.	11	*Aetna Ins. Co. v. Hyde,* 275 U.S. 400	1928
39.	21	*Louisville Gas Co. v. Coleman,* 277 U.S. 32	1928
40.	10	*Hunt v. U.S.,* 278 U.S. 96	1928
41.	15*	*Kennedy v. Minarets etc. Co.,* 90 Cal. App. 563 (See fn. 2)	1928
42.	21	*Corp. Comm. v. Lowe,* 281 U.S. 431	1930
43.	13	*O'Gorman & Young, Inc. v. Hartford etc. Co.,* 282 U.S. 251	1931
44.	21	*Tax Commissioner v. Jackson,* 283 U.S. 527	1931
45.	17*	*Crowell v. Benson,* 285 U.S. 22 (See fn. 1)	1932
46.	21	*First Nat. Bank v. Tax Comm.,* 289 U.S. 60	1933
47.	21	*Puget Sound Co. v. Seattle,* 291 U.S. 619	1934
48.	24	*Spokane International Ry. Co. v. U.S.,* 72 F. 2d 440	1934
49.	13	*Pacific States Co. v. White,* 296 U.S. 176	1935

Serial No.	Brief Page	Authority[4]	Date of Decision or Authority
50.	13	*Thompson v. Consolidated Gas Co.*, 300 U.S. 55	1937
51.	11	*Currin v. Wallace*, 306 U.S. 1	1939
52.	9	*Standard Oil Co. of Calif. v. U.S.*, 107 F. 2d 402	1939
53.	11	*U.S. v. San Francisco*, 310 U.S. 16	1940
54.	13	*Forbes v. U.S.*, 125 F. 2d 404	1942
55.	24	*U.S. v. Chesapeake & O. Ry. Co.*, 130 F. 2d 308	1942
56.	20	*Detroit Bank v. U.S.*, 317 U.S. 329	1943
57.	24	*Chesapeake & O. Ry. Co. v. U.S.*, 139 F. 2d 632	1944
58.	21	*Independent Warehouses v. Scheele*, 331 U.S. 70	1947
59.	7	*U.S. v. California*, 332 U.S. 19	1947
60.	18	*Tennessee Valley Authority v. Lenoir City*, 72 F. Supp. 457	1947
61.	24	*Ventura County v. Southern California Edison Co.*, 85 Cal. App. 2d 529	1948
62.	24	*Kleinclaus v. Marin Realty Co.*, 94 Cal. App. 2d 733; 211 P. 2d 582	1949
63.	10	*Federal Power Comm. v. Idaho Power Co.*, 344 U.S. 17	1952
64.	25	*U.S. v. W.T. Grant Co.*, 345 U.S. 629	1953
65.	16	*Prentiss v. National Airlines*, 112 F. Supp. 306	1953
65A.	18	*U.S. v. Wiselrod*, 202 Fed. (2d) 629	1953
66.	9	*Submerged Lands Act of 1953*, 67 Stat. 29; 43 U.S.C. 1301-1315	1953
67.	9	*Alabama v. Texas*, 347 U.S. 272	1954
68.	20*	*Brown v. Board of Education*, 347 U.S. 483	1954
69.	20*	*Bolling v. Sharpe*, 347 U.S. 497	1954
70.	22*	The *Perko* cases. Since counsel concedes that our analysis of the Perko cases is completely correct; (as he states) "Unexceptional," we will not mention them again, although we rather think they are not "dicta," since several hundred thousand dollars were awarded in favor	

Serial No.	Page	Authority[4]	Date of Decision or Authority
		of the Plaintiffs and against the *U.S.* on the basis of the rulings cited in our brief. In our argument we further discuss the *Perko* cases.	1955–59
71	10*	*Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275	1958
72.	25	*Gramm v. Lincoln,* 257 F. 2d 250	1958
73.	25	*Bruce v. Travelers Ins. Co.,* 266 F. 2d 781	1959
74.	12	*Best v. Humboldt Mining Co.,* 371 U.S. 334	1963
75.	18	*Ferry v. Udall,* 336 F. 2d 706	1964
76.	13	*McMichael v. U.S.,* 355 F. 2d 283	1965
77.	15*	*Annual Fire Report for the National Forests,* U.S. Department of Agriculture, p. 3; Table 3, p. 1	1966

*Authority first cited in Appellants' Opening Brief.

[1]Of course, workmen's compensation revenues are not absolute liability; for example, a drunken workman cannot recover. Secondly, they are wholly statutory in source and did not exist at common law; in fact, at common law a laborer could not even sue his employer.

[2]In this case the court specifically refused to impose absolute liability and awarded treble damages for negligence under a statute.

[3]All this report is cited for is the fact that fires represent a major threat to forests, that they are one of the great economic misfortunes of the country, that between 1961 and 1965 11,702 forest fires annually burned an average of 138,868 acres; that in 1966 the number of acres burned was 332,921; that in California forest fires are particularly destructive; that the damage to California (from something, presumably forest fires) was 7,942,200 and was nearly six times that of the next state, Idaho.

[4]The foregoing 79 authorities may be divided into age-periods by number and percentage, about as follows:

Before 1700	2	2.5%
Between 1700 and 1900, incl.	14	17.7%
Between 1901 and 1920, incl.	13	16.5%
Between 1921 and 1940, incl.	25	31.6%
Between 1941 and 1960, incl.	21	26.6%
After 1960	4	5.1%
Total	79	100.0%

APPENDIX B.

Negligence as a Part of English and American Law.

At Page 16 of the Government's brief the statement is made, "Since the times of Aethelbert and Alfred the Great *the* doctrine of torts was that of absolute liability. *Negligence was unknown to the law until some thousand years later.*" (emphasis added) Since Alfred the Great's rule ended in 899, this is equivalent to stating that negligence was unknown to our law until 1899. Statements of this nature, being, as they are, wholly inaccurate, are typical of the Government's brief and the same sort of wild claim permeates the entire document.

In fact, of course, negligence was clearly recognized at a very early date and accepted in principle as far back as the reign of Edward I and Richard II. It was commonly litigated in the time of Elizabeth I. The subject matter is discussed at length in 2 Jones, Blackstone, 1726-1728, where relevant citations are given.

William Carey Jones's Note to the later edition of Blackstone's Commentaries points out that:

> "Negligence is defined to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do."

This quotation is from *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781.

This sophisticated definition, which would well serve today, is, of course, the culmination of hundreds of years of judicial analysis of the nature of the law of negligence.

2 Jones, Blackstone 1657, Note 10.

In 1 Parker's Digest of California Reports and Statutes (San Francisco, H. H. Bancroft & Co. 1869), the first digest of California law, as we are advised, the author digests the California negligence cases which had been decided in the Supreme Court of California in the first eighteen years of its existence. In that brief period sixteen cases involving negligence had already reached the highest court of California. These cases are listed below in this Appendix and clearly demonstrate that even in the most western of our states and in the earliest days of its existence, negligence was well entrenched as an important principle of our jurisprudence. In fact, in apparently the first case considered by the California Supreme Court where the issue of negligence was involved, *Hallower v. Henley,* 6 Cal. 209, decided in April 1856, the precedents cited were 4 Metcalf 55 [*Farwell v. Boston & Worchester RR Corp.* (1842) 4 Met. 55, 45 Mass. 49], and 5 Exchequer 341 [*Mead v. Bashford* (1850) 5 Ex. 341; 155 Eng. Rep. 147]. All California negligence cases cited in Parker, *op. cit.* follow:

1. *Hallower v. Henley* (1856) 6 Cal. 209.
2. *James v. San Francisco* (1856) 6 Cal. 528.
3. *Finn v. Vallejo Street Wharf Co.* (1857) 7 Cal. 253.
4. *Hoffman v. Tuolumne County Water Co.*
5. *Wolf v. St. Louis Independent Water Co.* (1858) 10 Cal. 541.
6. *Fraler v. Sears Union Water Co.* (1859) 12 Cal. 555.
7. *Hastings v. Halleck* (1859) 13 Cal. 203.
8. *Whitney v. Butterfield* (1859) 13 Cal. 335.
9. *Jackson v. Feather River & Gibsonville Water Co.* (1859) 14 Cal. 18.

10. *Algier v. The Steamer Maria* (1859) 14 Cal. 167.
11. *Hull v. Sacramento Valley RR Co.* (1859) 14 Cal. 387.
12. *Todd v. Cochell* (1860) 17 Cal. 97.
13. *El Dorado County v. Elstner* (1861) 18 Cal. 144.
14. *Richmond v. Sacramento Valley RR Co.* (1861) 18 Cal. 351.
15. *Richardson v. Kier* (1867) 34 Cal. 63.
16. *Gay v. Winter, et al.* (1867) 34 Cal. 153.

APPENDIX C.

2710

FOREST SERVICE MANUAL
WASHINGTON, D.C.

MERGENCY DIRECTIVE NO. 5 June 30, 1968

ISTRIBUTION: In-Service Holders of FSH-2700

HAPTER: 2710 - SPECIAL USES

OSTING NOTICE: Last E. D. in 2700 is No. 4
Post Following Chapter 2710, SPECIAL USES

HIS DIRECTIVE COVERS THE SETTING OF FEES FOR CONCESSION (COMMERCIAL UBLIC SERVICE) SPECIAL USE PERMITS, by providing instructions for pplying the Graduated Rate Fee System (GRFS).

he Graduated Rate Fee System (GRFS) will be used where appropriate fter July 1, 1968, i.e.; in all new permits and in all existing ermits where it is not precluded by the terms of the permit, except hat the present system will continue to apply to existing winter orts permits.

his E.D., in booklet form, is being distributed to concession Per- ttees who responded to the July 10, 1967 Review Draft description GRFS, and to other individuals, agencies and organizations with interest in it.

e Calculation Worksheets - FS-2700-19 and FS-2700-20 are being nt directly to the Regions for distribution by the Lands Division the Forests on the basis of need.

M. M. NELSON
Deputy Chief

ote: The emphasis on Pages 2710--3, 2710--6, 2710--7 and 2710--17 is ours.)

A GRADUATED RATE SYSTEM FOR SETTING FEES TO BE PAID BY HOLDERS OF NATIONAL FOREST CONCESSION PERMITS

FOREST SERVICE
U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.
JUNE 1968

E.D. NO. 5
6/30/68

PRINCIPLES OF THE SYSTEM

OBJECTIVE

The objective of the Graduated Rate Fee System is to establish fees for National Forest concession Special Use Permits commensurate with the value of the use authorized by the permit. **

PREMISES

The Graduated Rate Fee System is based on several fundamental premises. They are:

- the fees to be paid shall
  - afford a permittee of average operating efficiency an opportunity, under normal circumstances, to make a reasonable profit on his investment;
  - permit reasonable charges to National Forest visitors for goods provided and services rendered;
  - result in an equitable return to the Government for the use of the public land involved;
  - recognize a public need for the services and facilities authorized; and
  - be reasonably comparable to the rent paid by the industry as a whole for the same or similar kinds of businesses, but since the fees should reflect the public need for the services or facilities provided, they need not necessarily be all that a private landowner might charge.
- The investment that a permittee is willing to make in fixed assets in the development of a National Forest site, and the volume of business generated by that investment reflect the productivity of the site involved, and fees should be assessed accordingly.
- Concession sales may be greatly affected by weather** ** and frequently by adverse natural forces such as slides, avalanches, fires, and floods. An equitable fee must reflect these fluctuations over which the permittee has no control.

(UNDERLINING FOR EMPHASIS ADDED THROUGHT THIS APPENDIX BY DEPT'D MT)

n calculating a fee the breakeven point for a single business operation s used as established. In mixed business operations a weighted or com- osite breakeven point is calculated. This is accomplished by (1) ultiplying the breakeven point established for each type of business by he percentage that this kind of business bears to the total business hen (2) adding these percentages to arrive at the composite breakeven oint. A work sheet makes this a simple arithmetic step. See page 49.

inter sports operations are handled as a single integrated business. he breakeven point established is already a composite based on the tudy of winter sports operations used in developing the fee system.

he definitions of the 10 businesses are:

Groceries. Includes sales of items usually associated with grocery stores, such as staple foods, meats, produce, household supplies such as cleaning material, staple drug articles, etc. This item includes bottled soft drinks and beer when included in the grocery operation.

Service, Food. Includes meals, sandwiches, and other food materials prepared for carry-out or consumed on the premises. So-called snackbars are included here. It includes non-alcoholic drinks and beer sold in conjunction with food.

Service, Cars. Includes all kinds of articles and services used in servicing and repairing automobiles. Where no service station or garage business is operated as such and auto accessories are sold by a general store, such sales are included under General Merchandise.

General Merchandise. Includes clothing and hardware; also boat accessories, fish bait and tackle, hunting equipment and supplies, other sporting goods, souvenirs, gifts, and sales of licenses.

Service, Liquor. Includes all alcoholic drinks for comsumption on the premises and other sales ordinarily a part of a bar or cocktail lounge business. Where a bar is operated in conjunction with a restaurant or overnight accommodations, liquor and beer sales are recorded and reported separately. Alcoholic beverages for consumption off the premises are also included in this item except as indicated in Groceries and Services, Food, above.

Outfitter-Guides. All activities or commercial guiding services involving back country travel regardless of mode of travel when associated with a permitted resort or dude ranch. All service charges are considered sales.

Service, Room. Includes all income for lodging where daily room service is furnished. Income from furnished cabins and cottages that do not receive maid service is reported under Rentals, Cabins.

Rentals, Cabins. Includes income fron rental of furnished or unfurnished cabins, cottages, housekeeping rooms, condominiums, motel units, etc., where daily maid service is not furnished by the permittee.

Rentals, Other. Includes all revenue from rental of camping space, improved or otherwise; trailer courts; trailer, boat and other equipment rentals; horse rentals, barber shop, pool hall, and other services. Marina sales of gasoline and oil for boats, repair services, and dockage or mooring charges are included.

Winter Sports. The commercial enterprises under a special-use permit oriented to skiing or snowplay activities. However, a use associated with skiing or snowplay but which is covered by a separate permit will be categorized as being what it is, rather than winter sports. For example, a lodge may be associated with a ski area, but, if under separate permit it will be considered as a lodge rather than as winter sports. A separately permitted ski school will be classed as winter sports. However, the fee rate for the school will be determined following the instructions on page 9.

RATE SCHEDULES

The rates used in calculating fees are taken from graduated rate schedules established in the System. The first of the regular schedules is used in setting fees for all businesses except Winter Sports. The second regular schedule applies to Winter Sports only. These rates in both schedules are standard for Servicewide use in the direct calculation of basic fees. A basic fee so calculated may be subject to a surcharge set either as the result of competitive bidding or by negotiation.

When operated as single businesses, special schedules are provided for Service Stations, and Outfitter-Guide operations.

anging GFA

nce fixed, GFA will be changed only under the following circumstances: 1) it may be adjusted as provided under the instructions for "Upon ale and Transfer of Permit" and (2) it will be updated everytime a ee is calculated. This may or may not result in a change. It is a tep taken to recognize additions, deletions, modernization, or nrecovered losses (such as fire) of an existing permittee.

nformation needed to update GFA will be submitted by the permittee s a part of his annual operating statement. Therefore, it is to ne permittee's advantage to keep good records, and report his nvestment changes regularly.

Ince local Forest officers administering permits will know whether ne changes claimed did or did not occur, no special audit need be ade to verify these records between routine audits.

n new or reissued permits where flat fees are not involved, updating ll be done annually. In existing permits with either percentage ees or flat fees, it will be done at 5-year intervals. Regular pdating in GFA is made in this way:

Enter established GFA for improvements	$_____	
Show net difference of improvement additions and deletions	$_____	
Subtotal for improvements		$_____
Enter last cost of short-lived equipment and fixtures	$_____	
Show additions and deletions	$_____	
Subtotal for equipment & fixtures		$_____
rand Total GFA		$_____

g. Items listed in a policy statement prepared by the permittee pertaining to gratuities previously approved in writing by the Forest Supervisor. The policy statement will describe how gratuities are to be recorded. A record of gratuities not exempt will be kept by the permittee as a part of the records required under this permit. 1/

h. Franchise receipts.

/ A sometimes complicated aspect of setting sales stems from the act that a limited amount of "on the house" gratuities are nherent in most business enterprises. They may take the form of free meal, a free riding lesson, a ski lift pass, the use of oncessioners facilities, etc. These are customary trade practices. s a guide to how much of this should be included in sales for ee calculations, the Forest Supervisor will secure agreement with he permittee as to the general nature and extent of his planned ratuity program. As part of this, before the beginning of the eason the permittee will provide the Forest Supervisor with a olicy statement indicating the nature and extent of his planned ratuity program and who will be the recipients. This may include ersons present in the interest of safety of the public; those hose presence will significantly increase sales by publicity for he operation; competitors, judges, and other officials of rganized competitive or exhibition events; officials responsible or inspection and administration of the permitted use; and other imilar purposes.

fter review and approval by the Forest Supervisor, the permittee's easonable adherence to his program will be controlled as one spect of the routine inspection of the permitted operation. The olicy statement will remain effective until or unless the permittee equests a change. In event of a change, review and approval will e handled as was the original plan.

APPENDIX D.

The Hammurabi Code.

200.

If a man knock out the teeth of a man who is his equal in rank, one shall knock out his teeth.

201.

If he knock out the teeth of a freedman, he shall pay one-third mina of silver.

202.

If a man strike a man of higher rank than himself, one shall give him sixty strokes with a cow-hide whip in public.

It seems that public whipping was practiced in Israel too, as in the case of the husband who falsely accused his wife or betrothed of unchastity. (Deut. 22:18.) Some kind of fornication was likewise punished with public whipping. (Lev. 19:20.)

203.

If a free-born man strikes a man of his own rank, he shall pay one mina of silver.

204.

If a freeman strike a freeman, he shall pay ten shekels of silver.

205.

If the slave of a freeman strike a freeman, one shall cut off his ear.

THE WALL STREET JOURNAL, Friday, June 28, 1968 5

Co-Ops in Ohio Buy 50% Interest In Power Facility

Purchase for $66 Million From American Electric Is First of Kind in U.S.

No Federal Financing Used

By a WALL STREET JOURNAL *Staff Reporter*

COLUMBUS, Ohio—A group of 27 Ohio rural electric cooperatives purchased for $66 million a 50% interest in a $131 million power plant near Steubenville, Ohio, from American Electric Power Co., New York.

It's the first time that an investor-owned utility and rural electric cooperatives have shared an electric generating facility, and the first time cooperatives have financed a power-plant project with non-Federal funds.

Buckeye Power Inc., owned by the cooperatives, placed privately with a group of 12 insurance companies and other institutional lenders $62 million in bonds. These proceeds and equity funds from the cooperatives were used to finance the purchase.

The power facility, known as the Cardinal Plant, contains two 615,000-kilowatt generating units. It was placed in operation last July by Ohio Power Co., a subsidiary of American Electric Power, a holding company with utility operations in seven states.

Power from the plant will be distributed to

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Power from the plant will be distributed to the cooperatives over lines of seven investor-owned utilities in the state.

Owen Manning, president of Buckeye Power, said the purchase indicates that cooperatives in Ohio have "attained such a maturity" that they are "no longer dependent on Government financing" to achieve ownership of electric generating facilities. The Ohio cooperatives serve 155,000 customers.

Until now, cooperatives have received power either by buying it from Federal or investor-owned power systems, or by banding together to build Federally financed plants through "super cooperatives."

The Federal Power Commission, in giving its approval to the joint cooperative project with American Electric Power termed it "an encouraging development."


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T 3 N
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Middleboro
Mechanicsburg
Harrietsville
Marr
Greysville
Antioch
Sycamore Valley
Hannibal
NEW MARTINSVILLE
Paden City
Sistersville
Lemon
Germantown
Hatfield
Lower Salem
Whipple
Reinhard
Stanleysville
Devola
Warren
MARIETTA
Washington
Bloomfield
Wingett Run
Olive
Shay
Dart
Moss Run
Deercher
Wade
Bevay
Newport
St Marys
Hebron
Belleville
Lock No 1
Grandview
Friendly
New Matamoras
Long and Lock Point
Hens Run
Ohio Company Purchase
Ohio River
Muskingum
Little Muskingum
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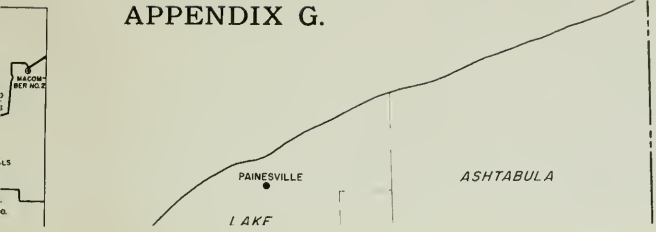
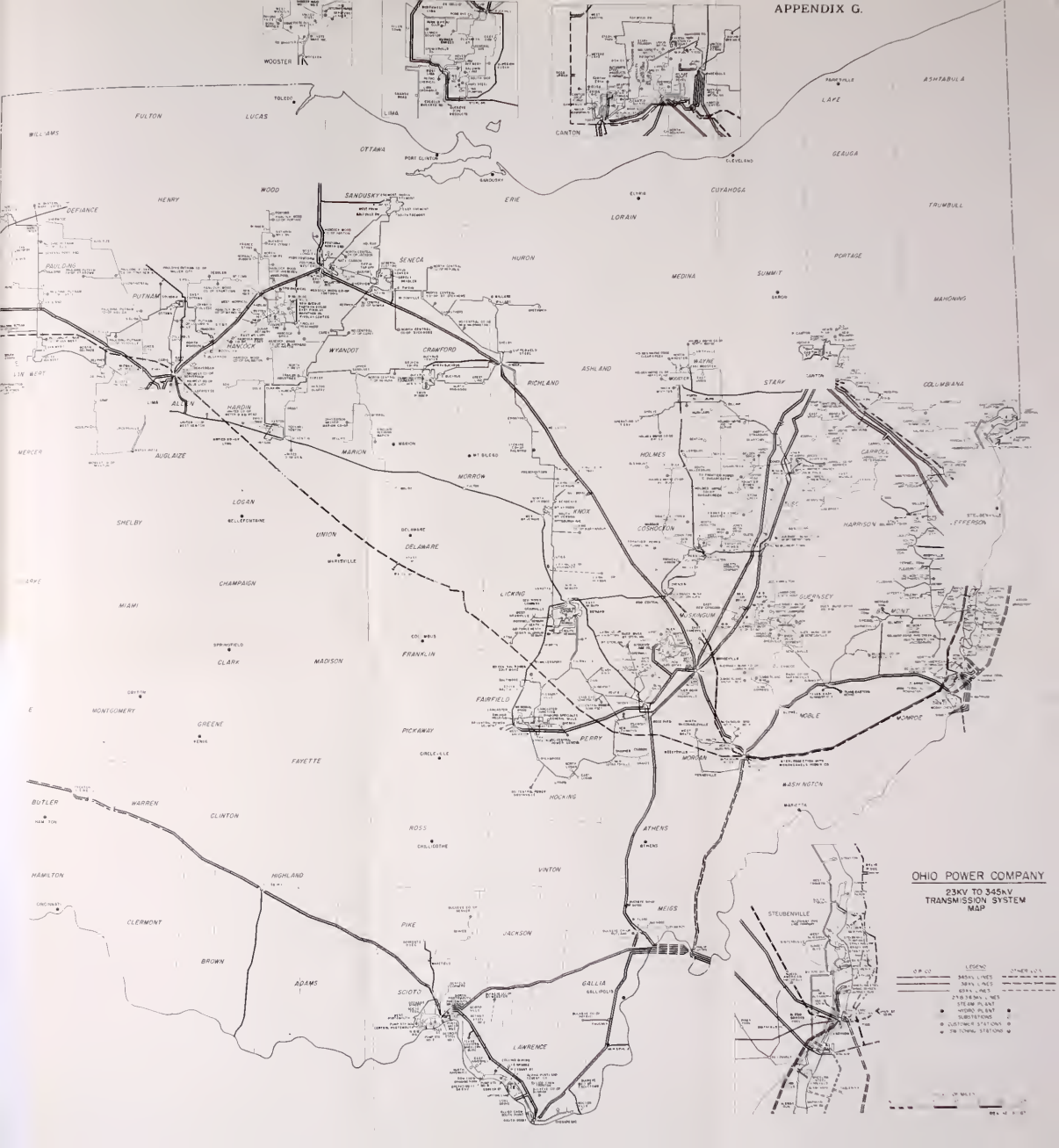
2


WAYNE NATIONAL FOREST
OHIO
OHIO RIVER SURVEY
1966

APPENDIX G.




OHIO POWER COMPANY
23KV TO 345KV
TRANSMISSION SYSTEM
MAP
LEGEND
345KV LINES
138KV LINES
69KV LINES
23,18,14.5KV LINES
STEAM PLANT
HYDRO PLANT
SUBSTATIONS
CUSTOMER STATIONS
INTERCHANGE STATIONS
WOOSTER
TOLEDO
LIMA
CANTON
CLEVELAND
FULTON
LUCAS
WILLIAMS
OTTAWA
PORT CLINTON
SANDUSKY
ERIE
ASHTABULA
LAKE
GEAUGA
CUYAHOGA
LORAIN
TRUMBULL
DEFIANCE
HENRY
WOOD
SENECA
HURON
MEDINA
SUMMIT
PORTAGE
MAHONING
PAULDING
PUTNAM
HANCOCK
WYANDOT
CRAWFORD
RICHLAND
ASHLAND
WAYNE
STARK
COLUMBIANA
ALLEN
HARDIN
MERCER
AUGLAIZE
MARION
MORROW
KNOX
HOLMES
CARROLL
HARRISON
JEFFERSON
LOGAN
SHELBY
UNION
DELAWARE
COSHOCTON
GUERNSEY
CHAMPAIGN
MIAMI
LICKING
MUSKINGUM
CLARK
MADISON
FRANKLIN
COLUMBUS
SPRINGFIELD
FAIRFIELD
PERRY
MORGAN
NOBLE
MONROE
MONTGOMERY
GREENE
PICKAWAY
FAYETTE
CIRCLEVILLE
WASHINGTON
MARIETTA
BUTLER
WARREN
CLINTON
HOCKING
ATHENS
MEIGS
ROSS
CHILLICOTHE
VINTON
HAMILTON
HIGHLAND
CLERMONT
PIKE
JACKSON
BROWN
ADAMS
SCIOTO
GALLIA
GALLIPOLIS
LAWRENCE
STEUBENVILLE